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AUG 5 1957
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No. 257

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOE R. STEELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 27–36) is reported at 243 F. 2d 712.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1957 (Pet. 37) and a petition for rehearing was denied on June 11, 1957 (Pet. 38). The petition for a writ of certiorari was filed on July 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in permitting the Government to elicit from peti-

tioner on cross-examination the fact that he had not testified at the first trial—petitioner having voluntarily taken the stand and having failed to assert any constitutional privilege.

2. Whether the trial court erred in admitting, on the issue of petitioner's credibility, evidence that he had been convicted in a state court of the felony of conducting a policy game.

STATUTE INVOLVED

18 U. S. C. 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts-martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

STATEMENT

On May 5, 1954, petitioner was indicted in the United States District Court for the Western District of Texas for the wilful attempted evasion of his income taxes for the years 1947 and 1948 by filing false and fraudulent returns. A trial in 1954 resulted in a verdict of guilty on both counts, but the judgment was reversed by the Court of Appeals for errors in the admission of evidence. *Steele* v. *United States*, 222 F. 2d 628. Upon the second trial, the jury found petitioner guilty as to the year 1947 and not guilty as to 1948. (R. 1423.) On July 16, 1956, petitioner was sentenced to two years imprisonment and fined $7,500. (R. 1424.)

Petitioner was a professional gambler, and during the indictment years had partnership interests in policy games, dice games, football cards, and the distribution of punch boards and pinball machines. (R. 136, 142–143, 205, 310, 319, 452–453, 670, 691–692, 843.) In addition to his interests in these partnerships, petitioner engaged in considerable personal gambling, including dice playing, football and baseball bets and horse-racing bets, playing at times for large stakes. (R. 291, 436, 633.) Although he told the investigating agents that he played the odds and always came out on top, none of petitioner's income from personal gambling was reported on his returns, and he admitted that he had kept no record of it. (R. 521, 633; Govt. Exs. 6 and 8.) It further appeared that only meager records had been kept of the income of the gaming ventures in which petitioner was a partner. (R. 516–519, 583, 596, 673, 757–758, 1030–1032.)

The Government's reconstruction of petitioner's income for the years in question, based on the net worth expenditures method, showed that his true income exceeded his reported income by some $14,000 in 1947 and some $33,000 in 1948.

The amount of money which petitioner had borrowed from a relative, one J. T. Deaver, during 1948 (and the corresponding liability at the end of the year) became, at the second trial, one of the critical issues on the question of evasion of his 1948 taxes. At the first trial the Government introduced petitioner's sworn statement: "In addition, however, in the early 1940s I borrowed $2,500 from J. T. Deaver, in 1948 I

borrowed $4,500 from him. . . ." (Gov't Ex. 60).[1] Deaver was then alive. The statements were uncontradicted, and Deaver was not called as a witness. At the time of the second trial Deaver had died. Petitioner took the stand and testified that during the year 1948 he had borrowed not $4,500 from Deaver but $25,500. (R. 1066.) If true, this would have reduced his net worth, and correspondingly his 1948 net income, by $21,000. On cross-examination, petitioner testified that he had not taken the witness stand at the first trial of the case. He also admitted that he had been convicted of the felony of gambling in 1943.

ARGUMENT

Petitioner here, as in the Court of Appeals, seeks to raise the issue of infringement of his constitutional privilege against self-incrimination. No such claim was made in the District Court, it is without merit, and there was no possible prejudice.

1. At the outset of the trial, and at the request of petitioner's counsel, the court asked both sides to try to avoid reference to the fact that the case had been tried before (R. 1075–1076). At that time it was understood by the court (R. 1076) that the petitioner was not going to take the stand. When petitioner did take the stand and introduced the surprising testimony that Deaver had lent him $25,500 during 1948 (R. 1066) (instead of $4,500, as he had previously said in a sworn statement), the Government, over ob-

[1] A certified copy of the record of the first trial, *Steele* v. *United States*, 222 F. 2d 628 (C. A. 5) has been lodged with the Clerk. Exhibit 60 (then numbered 57) was introduced at R. 482–483 of the first trial.

jection, was allowed to bring out the fact that petitioner had not testified at the previous trial. (R. 1076.)

Although petitioner objected to the question, he did not object on the ground that it would affect any constitutional right of his. Specifically, petitioner did not raise the question of the Fifth Amendment, the privilege against self-incrimination, or the statutory right that no presumption shall be taken from a defendant's failure to take the stand. The full text of the objections raised by petitioner's counsel as they appear in the transcript of record (R. 1075–1076) is given in the footnote.[3] It will be seen that the only

[3] "Mr. Foster. We object to counsel for the Government making any inquiry of the defendant or any other person concerning the previous trial of this case, for the reason that the fact that the case has been previously tried is immaterial and irrelevant to any issue in this case, and it cannot help but serve to prejudice the jury's mind against the defendant and cause them to speculate as to whether he was convicted or not, and if he was convicted why he is here being tried again. We believe that it would cause the jury to speculate and determine that he probably was convicted and that his case was reversed and was remanded here for another trial, and, as previously stated, that fact would be immaterial and irrelevant to any issue in this case and wholly prejudicial to the defendant.

"Mr. Langley. And, further, the fact that the jury might so assume and in all probability would so assume that since the jury in a previous case had convicted him, that there must have been some good and sound basis for such conviction, and such evidence will hence militate against the defendant and can serve no other purpose than to inflame and prejudice the minds of the jury against the defendant and lead to a conviction on this trial.

"Mr. Foster. And I, at least, understood at an early conference that Your Honor had instructed everyone that had any participation in this case to make no reference to any previous trial." [R. 1075–1076.]

ground raised was fear that the fact of a former trial would prejudice the jury. No mention was made of the Fifth Amendment or any other constitutional provision. No suggestion was made that to allow the question would undercut petitioner's privilege against self-incrimination. The District Court was never given the opportunity to rule on that issue.

Even two and a half months later, when petitioner filed his "Bill of Exception No. 2," and restated his objections to the question, no constitutional issue was raised. It was there suggested that such a question was immaterial and irrelevant and would "prejudice the minds of the jurors against the defendant and raise a question in the minds of the jurors as to the veracity of defendant's testimony." (R. 1485.) The nearest petitioner came to asserting his privilege against self incrimination was the statement in the Bill of Exceptions that the question—

> * * * would probably lead to speculation on the part of the jury as to the reason or reasons why the defendant did not take the stand in his behalf at a former trial, and that it probably would, in the minds of laymen, lead to the conclusion that if the defendant had been innocent, he would have taken the stand in his own defense at a former trial; that under the facts and circumstances of this case, the cumulative effect of any such interrogation would result in the denial of a fair trial to the defendant.

It is well settled that the privilege against self-incrimination must be specifically raised. While no precise formula of words is required, the fact that a man being interrogated is relying on his constitutional right

not to give testimony that may be used against him must be asserted. The claim must be sufficiently definite to apprise the court of his intention to rely on the privilege against self-incrimination. *See Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190. "The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113. Even in *Johnson* v. *United States*, 318 U. S. 189, relied on by petitioner, the Court affirmed the conviction where it found that the defendant had not insisted upon his constitutional objections.

Not only was there no claim of privilege in the District Court by petitioner, there was no indication or allegation there that his original failure to take the stand was in any way connected with his constitutional privilege. It may well be, and would seem probable, that petitioner's failure to take the stand at the first trial was because Deaver was still alive, and petitioner feared that he would contradict petitioner's story as to the amount he had borrowed from Deaver in 1948.

We submit that, in these circumstances, the Court should decline to consider the constitutional issues which petitioner seeks to raise here, none of which were raised in the District Court.

2. In any event, petitioner's privilege against self incrimination was not violated by his being asked if he had testified at a former trial.

In *Raffel* v. *United States*, 271 U. S. 494, this Court held unanimously that it is not error to require a de-

fendant offering himself as a witness upon a second trial and denying the truth of evidence offered by the prosecution to disclose upon cross-examination that he had not testified as a witness in his own behalf upon the first trial, and to explain why he did not deny the same evidence when then offered. In the instant case, the trial court limited the Government to a mere inquiry as to whether petitioner had testified at the first trial. (R. 1076.) This limitation so diminished the value of the point to the Government that no reference to the first trial was made by either prosecutor in his summation.* Moreover, the court charged the jury, in connection with the fact that the case had been tried before, that "you will not consider for any purpose, nor discuss that fact in determining the guilt or innocence of the defendant". (R. 1415.) This case, then, is *a fortiori* from *Raffel*.

The petitioner argues, however, that the *Raffel* case is not controlling because (a) there was no showing here of inconsistency between petitioner's testimony and the evidence introduced by the Government at the first trial; (b) the court had asked counsel on both sides, before the trial, to avoid any reference to the fact that the case had been tried before; and (c) the vitality of the *Raffel* case has been destroyed or at least weakened by *Johnson* v. *United States*, 318 U. S. 189 and *Grunewald* v. *United States*, 353 U. S. 391.

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*The only approach to such a reference was the sentence: "I've already mentioned about his appearance on the stand here, the first time he's ever come forward in this case to offer these explanations." (R. 1388.) This could as well have referred to the many conferences petitioner had with the agents during the lengthy investigation as to his election not to testify at the first trial.

(a) Petitioner errs in stating (Pet. 14):

> There is no showing here, as there was in *Roffel*, that any statement of the defendant as a witness conflicts with any Government evidence adduced *at the former trial*. The record here simply does not show the slightest basis for the asking of the question. [Emphasis in original.]

The Government's evidence relating to petitioner's assets and liabilities was, so far as pertinent here, substantially the same at both trials.[4] And since the same judge presided at both trials he may be presumed to have been aware of that fact. Near the end of the second trial, petitioner took the witness stand and testified to aspects of his financial affairs in sharp conflict with written and oral statements he had made to the investigating agents and, accordingly, in conflict with the Government's evidence at both trials. This testimony, if believed, would have had the effect of wiping out the unreported income for 1948 and cutting down that for 1947. One example will suffice. Petitioner had stated under oath, in writing that he owed Deaver $7,000 as of the end of 1948. (R. 528, 702; Govt. Ex. 60.) He had specifically requested the Government agents not to get in touch with Deaver because he was old and sick. (R. 515.) Nothing to contradict the $7,000 figure was ever suggested to the Government during the long investigation (which began in 1951—R. 581) or during the first trial. At the second trial (in 1956), petitioner testified that at the

[4] Compare R. 635–709 with the record of the first trial (No. 15,187, R. 638–654, 663–669), *Steele* v. *United States*, 222 F. 2d 628 (C. A. 5).

end of 1948 he had owed Deaver $28,000. This item alone, representing a $21,000 increase in a liability at the closing point, would have destroyed about two-thirds of the unreported income for 1948. Since petitioner's testimony was in direct conflict with evidence adduced by the Government at both trials, it became appropriate to inquire as to whether petitioner had testified at the first trial, which was done here, and (under *Raffel* v. *United States*, *supra*) to call upon him to explain why he had not so testified, which was not done here.

(b) Also without merit is the argument (Pet. 15–20) that the alleged error was aggravated by the fact that before the trial the court had instructed counsel on both sides to avoid reference to the fact that the case had been tried before. This "ground rule" (Pet. 15) was promulgated at petitioner's request. The court had acceded to the request on the assumption that, as in the former trial, petitioner would not testify. (R. 1075–1076.) The jury knew, long before petitioner took the stand, that the case had been tried previously because references to that trial had been made by two witnesses called by the Government (both of whom were friends of petitioner) and petitioner had moved for a mistrial. (R. 309–310, 325, 363–369, 1470–1471.) The basis for petitioner's main objection to the question of whether he had testified at the first trial (*i. e.*, that it might cause the jury to speculate that he had been convicted) was therefore swept away. (R. 1074–1075.) And certainly the District Court is the one to interpret its own "ground rule."

(c) In *Johnson* v. *United States*, 318 U. S. 189, the defendant, testifying in his own behalf, asserted a claim of privilege against self-incrimination while on the witness stand. The trial judge granted this claim but permitted the prosecutor in his summation to capitalize upon the fact that the defendant had found it necessary to invoke it. This Court affirmed the conviction. It went on to say that the trial court had erred in allowing defendant's claim of privilege because the question at issue was relevant and "was a proper part of cross-examination" (318 U. S. at 196), but, having allowed it, should not have permitted the prosecution to comment upon, and the jury to draw inference from, the claim of privilege. "In short," "an accused should not be misled on that score * * * if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed." (318 U. S. at 197.) As this recital shows, there is but little similarity between *Johnson* and the instant case.

The critical question in *Grunewald* v. *United States*, 353 U. S. 391 was whether the defendant Halperin's invocation of the privilege against self-incrimination before the grand jury was so inconsistent with his willingness to answer the same questions at the trial as to permit its use against him for impeachment purposes. The Court held that on the facts of that case there was no such inconsistency; that Halperin, already a potential defendant when he appeared before the grand jury, might well have furnished bits of evidence tending to incriminate himself

even though wholly innocent; that the fundamental differences between a trial and a grand jury proceeding must be taken into account; and that "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible". (353 U. S. at 421.) The Court explicitly noted that it was not reexamining or overruling the *Raffel* case (353 U. S. at 421).

None of the considerations which impelled the decision in *Grunewald* is present in the case at bar. Here, there was plain inconsistency between petitioner's contradicting of his own sworn statement at the second trial and his allowing it to stand unchallenged at the first. The forum was the same and petitioner on both occasions had all the protections accorded a defendant at a trial, as distinguished from grand jury proceedings. As noted above, there was no reference in the presence of the jury to the Fifth Amendment or the privilege against self-incrimination. See *supra*, pp. 5–6. There would appear to be a valid distinction between the case where one asserts his constitutional privilege against self-incrimination and where one simply stays silent. One always has a right to remain silent where a truthful statement would tend to incriminate, but "Silence is often evidence of the most persuasive character." *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–154.

3. There was no prejudice to petitioner. The alleged error on which petitioner seeks to have his conviction upset must be judged in its context. The incident now complained of was so minor in the

setting of the whole trial, particularly in view of the court's drastic limitation on the line of inquiry (R. 1076), the instruction to the jury (R. 1415), and the utter failure of the prosecution to capitalize on the matter,[5] that it seems highly unlikely that it could have had any impact on the verdict. *Cf.* the concurring opinion of Mr. Justice Frankfurter in *Johnson* v. *United States*, 318 U. S. at 202.

The trial lasted for two full weeks. There were fifty witnesses and well over a thousand pages of testimony. The single question as to which petitioner now complains was wholly insignificant. As pointed out above, there had been prior testimony as to the existence of the previous trial. Petitioner's counsel himself brought out the fact that petitioner had been convicted at that trial (R. 1227). The most critical issue as to which the cross-examination was directed related to the 1948 income tax. As to this count, petitioner was acquitted.

One week before the trial was over, the court indicated to counsel how he intended to charge the jury as to the former trial:

> The COURT. Let the record show that the Court intends to charge the jury that they must not consider for any purpose any reference to a former trial of this case, but are to consider solely and only the evidence adduced on this trial, unless the defendant requests that such instruction not be given. (R. 1425.)

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[5] In the summations of Government counsel no reference was made to the previous trial. In the summations of defense counsel three such references were made. (R. 1344, 1352, 1353.)

Petitioner took no exception to the proposed charge. None of petitioner's numerous requested instructions (R. 1432–1450) dealt with the issue of the former trial.[a] Neither did any of his objections to the charge that was given (R. 1451–1454). The charge, running some 27 pages, instructed the jury not to discuss or consider for any purpose the fact that there had been a former trial:

> The evidence in this case has developed the fact that the case has been tried before. In that connection, you are instructed that you will not consider for any purpose, nor discuss that fact in determining the guilt or innocence of the defendant. [R. 1415.]

There was the barest inquiry as to whether petitioner had taken the stand at the first trial, after which the court stopped further questioning. Petitioner was not asked whether he had pleaded the Fifth Amendment, or whether he had thought that the truthful answer to a particular question would tend to incriminate him. There was no attempt to equate the exercise of petitioner's constitutional rights with proof of guilt. The thrust of the inquiry on cross-examination was rather: "Did you ever tell this story before?"—a question which might well have been asked, and to which petitioner could hardly have objected. Nor did the prosecution make an attempt to arouse the jury or to prejudice petitioner by his failure to take the stand in the first trial. No further questions

[a] The cross examination as to the former trial was ground number 21 of petitioner's 32 grounds raised in his motion for new trial. (R. 1474.)

were asked by the prosecution as to the first trial. It was not referred to in summation.

4. Petitioner argues (Pet. 20–24) that the trial court erred in admitting evidence, on his cross-examination, that he had been convicted of the felony of operating a policy game (R. 1073). Petitioner concedes (Pet. 20) that it is well settled that when a defendant takes the witness stand evidence of a prior felony conviction is admissible on the issue of his credibility, but contends that (a) here the offense was too remote in time to have probative value, and (b) the rule permitting such evidence should be re-examined.

(a) The prior felony conviction was had in 1943, the tax years involved in this prosecution were 1947 and 1948, and the trial was held in 1956. Plainly, the offense was not so remote as to render the trial court's ruling an abuse of discretion. *Siglar* v. *United States*, 208 F. 2d 865, 868 (C. A. 5), certiorari denied, 347 U. S. 991; *United States* v. *Bucur*, 194 F. 2d 297, 304 (C. A. 7).

(b) Petitioner urges that, as a practical matter, juries are unable to obey an instruction (R. 1412) that such evidence must not be considered on the issue of guilt or innocence but only on that of the defendant's credibility. None of the cases he cites (Pet. 22) for this proposition, however, is in point.[7] We need

[7] The language quoted from *Krulewitch* v. *United States*, 336 U. S. 440, 453, appeared in a discussion of the difficulties encountered by defendants charged with conspiracy. *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C. A. 2) and *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C. A. 2), involved admissions of co-defendants. *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 656 (C. A. 2), related to an impropriety by Government counsel.

not argue whether it is desirable to re-examine the rule admitting such evidence, for it seems very clear that the instant case is peculiarly unsuitable for any such review. The evidence, including petitioner's own income tax returns, clearly showed that he had been a professional gambler and policy game operator since at least 1945. (*Supra*, p. 3, Govt. Exs. 2, 4, 6, 8, 18 and 19.) On *voir dire* examination of the jury panel, defense counsel stated that petitioner had been a gambler, emphasized that gambling was no violation of *federal* law, and inquired as to whether any of the prospective jurors might have a prejudice against him for that reason. (R. 13.) Since the jury was well aware of the fact that petitioner had been flagrantly violating the state gambling laws for years, it could hardly have come as a surprise to them that he had suffered one conviction. Plainly, the Court of Appeals was correct in stating (Pet. 32) "the proof of the conviction for gaming could not be said to have in any way introduced a new element into the case which reflected discreditably upon appellant."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957